Supreme Court, U.S.
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No. 96-248

IN THE

Supreme Court of the United States

October Term, 1996

MRS. SAMUEL E. ALLGOOD, individually and as independent executrix of the estate of SAMUEL E. ALLGOOD, MARCUS ALLGOOD and MALCOLM ALLGOOD,
Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD H. CALDWELL
MAYOR, DAY, CALDWELL & KEETON
1900 NCNB Center
700 Louisiana
Houston, Texas 77002
(713) 225-7000

Counsel for Respondent R.J. Reynolds Tobacco Company

SAM W. CRUSE, JR.
(Counsel of Record)
CRUSE, SCOTT, HENDERSON & ALLEN, L.L.P.
Two Houston Center
909 Fannin Street #1850
Houston, Texas 77010
(713) 650-6600

Counsel for Respondent The American Tobacco Company

[Additional counsel listed after conclusion]

QUESTIONS PRESENTED

1. Whether the courts below correctly held that certain of petitioners' state-law product liability claims were time-barred.

2. Whether the courts below correctly held that there was insufficient evidence to support a finding that petitioners' decedent had relied on statements or omissions allegedly made by respondents.

3. Whether the courts below correctly applied the Texas-law bar to product liability claims based on statements or omissions about a product's commonly known risks.

PARTIES TO THE PROCEEDINGS

Petitioner R.J. Reynolds Tobacco Company ("Reynolds") is wholly owned by RJR Nabisco Inc., which, in turn, is wholly owned by RJR Nabisco Holdings Corporation. Reynolds has the following partly owned subsidiaries: AO ISMA; AO3T Kabisco; AO Vostanovienniy Tabak; China-American Cigarette Company Ltd.; Modi RJR Ltd.; R.J. Reynolds-Da Nang Tobacco Co. Ltd.; R.J. Reynolds/M.C. Tobacco Co. Ltd.; R.J. Reynolds Tobacco-Kazakhstan; R.J. Reynolds Tobacco - Kremenchuk; R.J. Reynolds Tobacco - Lviv JSC; Reynolds Manufacturing (Bulgaria) Ltd.; Reynolds Manufacturing (Romania) SRL; RJR-Armavirtabak; Sunrise Biosystems, Inc; Tanzanian Cigarette Co.; RJR-Petro; R.J. Reynolds Tobacco (U.K.) Ltd.; R.J. Reynolds Tobacco (Poland) Ltd.; R.J. Reynolds Berhad; R.J. Reynolds Espana, S.L.; and R.J. Reynolds (Portugal) Empresa Comercial de Tabacos Ltd.

Respondent The American Tobacco Company ("American") was merged into the Brown & Williamson Tobacco Corporation ("Brown & Williamson") on February 28, 1995. Brown & Williamson is a wholly owned subsidiary of BATUS Tobacco Services, Inc. Brown & William's ultimate corporate parent is B.A.T. Industries, P.L.C. Brown & Williamson has no subsidiaries that are not wholly owned.

Respondent The Tobacco Institute, Inc. ("TI") has no parent companies, subsidiaries or affiliates. TI's current members are R.J. Reynolds, Brown & Williamson, Consolidated Cigar Corporation, Conwood Company, L.P., General Cigar Company, Inc., John Middleton Incorporated, Liggett Group, Inc., Lorillard Tobacco Company, Philip Morris U.S.A., The Pinkerton Tobacco Company, Swisher International, Inc. (formerly Helme Tobacco), Tobacco Exporters International (USA) Ltd./ Lane Limited, and United States Tobacco Company.

Respondent The Counsel Tobacco Research - U.S.A., Inc. ("CTR") has no parent companies, subsidiaries or affiliates. CTR's current members are R.J. Reynolds, Brown & Williamson, Bright Belt Warehouse Association, Burley Auction Warehouse

Association, Burley Stabilization Corporation, Burley Tobacco Growers Cooperative Association, Lorillard Tobacco Company, Philip Morris Incorporated, Tobacco Associates, Inc., and United States Tobacco Company.

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STATEMENT OF THE CASE

Petitioners are the wife and sons of the late Samuel E. Allgood. Petitioners filed this products liability action in the United States District Court for the Southern District of Texas, contending that Mr. Allgood had suffered injuries from smoking cigarettes manufactured by respondents R.J. Reynolds Tobacco Company ("R.J. Reynolds") and The American Tobacco Company ("American"). Petitioners raised claims only under Texas law and asserted federal jurisdiction only on the basis of diversity. The District Court concluded that petitioners' claims failed on several alternative state-law grounds and therefore granted summary judgment to respondents. The Fifth Circuit affirmed.

The summary judgment record showed that Mr. Allgood was diagnosed with emphysema as early as January 1985. At that time, Mr. Allgood was told by his physician, Dr. Kenamore, to stop smoking. In February 1986, Dr. Kenamore confirmed the prior diagnosis of emphysema, told Mr. Allgood that his emphysema was smoking-related, and once again advised him to quit. (R. 5037-5025). Mr. Allgood did not, however, quit until a year later, when he was diagnosed with cancer of the larynx. Mr. Allgood subsequently died on January 23, 1989. (R. 5530, 2058-2057). This lawsuit was filed on January 4, 1991. (R. 5530).

After more than three years of discovery, respondents moved for summary judgment. Respondents maintained that the record evidence would not permit petitioners to try any of their claims under Texas law. (R. 420, 3478, 3521, 3527, 4186, 4691). An April 12, 1994 hearing was held on respondents' motions before Judge David Hittner. (R. Vol. 24). While the motions were pending, the case was transferred to Judge Vanessa Gilmore. A second summary judgment hearing was held, and the motions for summary judgment were argued before Magistrate Judge Mary Milloy on July 28, 1994. (R. Vol. 25). Judge Milloy subsequently recommended that respondents' motions be granted, and Judge Gilmore adopted Judge Milloy's recommendation and granted summary judgment. (R. 5753-5752). The Fifth Circuit affirmed. (Pet. App. 1a-9a).

REASONS FOR DENYING THE WRIT

This case presents no important federal question. The decisions of the court of appeals and district court largely were based upon Texas law. Both courts affirmed summary judgment on petitioners' strict liability, negligence, conspiracy, and breach of warranty claims based on the statute of limitations. Both courts affirmed summary judgment as to the fraud claims based on insufficient evidence of reliance. Alternatively, both courts affirmed summary judgment because Texas law does not permit claims based on a product's commonly known risks. Petitioners have failed to show any extraordinary circumstances or very obvious and exceptional error, so the findings of the two lower courts should not be disturbed, and the Petition should be denied. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

I. THIS CASE PRESENTS NO SERIOUS PREEMPTION QUESTION

At the outset, petitioners briefly invite the Court to consider the extent to which the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, as construed in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), preempts state-law tort claims for fraudulent concealment. (Pet. 4-5). The Court of Appeals held that petitioners' claims were preempted "[t]o the extent that [they] are based on fraudulent concealment or a failure to warn after 1969." (Pet. App. 6a). Its decision in this regard clearly does not warrant further review.

To begin with, petitioners fail even to allege that the lower courts are divided on any question involving the preemption of fraudulent concealment claims. Indeed, petitioners neither cite nor discuss even a single lower-court preemption decision in any case other than this one. (Pet. 4-5, 21). In fact, the lower courts agree that the Labeling Act preempts fraudulent concealment claims based on statements that the defendant could have made through its advertising or promotion (15 U.S.C. § 1334(b)), but does not preempt fraudulent concealment claims based on

statements that the defendant could have made only through other channels of communication. *See, e.g., Cantley v. Lorillard Tobacco Co.*, No. 1950537, 1996 Ala. LEXIS 152, *10 (June 7, 1996); *cf. Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 418-19 (S.D. Fla. 1996); *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815, 822-23 (D.N.J. 1995). The decision below is completely consistent with these decisions, for petitioners in this case never alleged below, and do not even allege here, that Texas law required any disclosure through channels of communication other than "advertising or promotion." (Pet. 21-29).

Moreover, even if a preemption question did warrant the Court's review, this case presents an extraordinarily poor vehicle for addressing it. Regardless of what this Court might decide about preemption, the decisions below would still foreclose petitioners' fraudulent concealment claims on at least two independent state-law grounds: first, petitioners did not produce sufficient evidence to support a finding of reliance (Pet. App. 6a-7a), an essential element of fraud under Texas law, *e.g., Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); and second, because the risks of smoking are "common knowledge" within the meaning of *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991), Texas law does not permit product liability claims based on statements or omissions about those risks (Pet. App. 7a-8a). This Court should not address preemption in a case where that issue could not possibly affect the judgment entered and affirmed by the courts below.

II. THE COURT OF APPEALS CORRECTLY RULED THAT PETITIONERS' CLAIMS OF STRICT LIABILITY, NEGLIGENCE, AND CONSPIRACY WERE TIME-BARRED

A. Dr. Kenamore's Affidavit Was Timely Filed

Petitioners' statement that the affidavit of Dr. Kenamore was not filed until the day before the hearing on April 12, 1994, is misleading. (Pet. 5). The affidavit in question was filed on April 11, 1994, and a hearing was held before Judge Hittner on April 12, 1994. (R. Vol. 24). However, there was no ruling, and

the case was transferred to Judge Gilmore. The motions for summary judgment were reargued before Magistrate Judge Milloy at a hearing on July 28, 1994, over three months after the affidavit was filed. (R. Vol. 25). During that three-month period Petitioners never attempted to depose Dr. Kenamore, and Petitioners never moved for a continuance pursuant to Federal Rule of Civil Procedure 56(f). Finally, at the July 28, 1994 hearing, Petitioners indicated to Judge Milloy that they were abandoning their objection to the filing of Dr. Kenamore's affidavit. (R. Vol. 25, p. 60).

B. The Court Of Appeals Correctly Held That Mere Allegations By Petitioners That Dr. Kenamore May Have Been Mistaken, Without Supporting Evidence, Were Insufficient To Defeat A Motion For Summary Judgment

Petitioners sought to create a fact issue by looking to Mr. Allgood's testimony from a prior, unrelated workers' compensation proceeding. The district court properly refused to consider this hearsay, ruling that Federal Rule of Civil Procedure 32 permits the use of testimony from another litigation only against parties who were "present or represented at the taking of the deposition or who had reasonable notice thereof." *See also* Fed. R. Evid. 804(b)(1).

Petitioners do not contend that respondents were present or represented at the workers' compensation deposition, nor do petitioners maintain that the workers' compensation testimony would be admissible at trial. Petitioners instead argue that the district court should have treated this hearsay testimony as an affidavit, and considered it in deciding respondents' motions for summary judgment. Federal courts have rejected this logic on many occasions. For example, in *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990), the court explained:

> Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless.

Id., *quoting* 10A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2727 at 156 (1983 ed.)(internal quotation omitted); *see also Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1110 (1st Cir. 1986).

Here, petitioners did not show that "continuing the action" would be anything but "useless" because they did not put forth any facts that could be put in an admissible form at trial. In the authorities that petitioners cite, inadmissible testimony in the form of affidavits or inadmissible deposition testimony was considered at the summary judgment stage only where the individual affiant or deponent was alive *and could testify* to the underlying facts at trial.[1] Petitioners here offered no such potentially admissible trial testimony. Admittedly, their only hope was to elicit helpful testimony at trial on cross-examination of Dr. Kenamore. This is not, of course, what Federal Rule of Civil Procedure 56 contemplates. "Summary judgment cannot be avoided where all that the responding party can hope for is to induce [the affiant] to discredit his affidavits on cross-examination during trial." *Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 856 F. Supp. 910, 936 (E.D. Pa. 1994), *quoting* 28 Fed. Proc., L.Ed.

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[1] For example, in *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 967 n.3 (9th Cir. 1981), the court considered hearsay deposition testimony where the deponents were "live witnesses available for testimony, whose testimony would be admissible at trial." *See also Tormo v. Yormark*, 398 F. Supp. 1159, 1169 (D.N.J. 1975) (considered inadmissible deposition testimony where at trial the facts could be offered "in the form of testimony of presently available witnesses"); *Napier v. Brown*, 492 N.E.2d 847, 851 (Ohio Ct. App. 1985) ("these authorities place heavy emphasis on the fact that on a motion for summary judgment, the statements are not offered in the form of prior deposition testimony but in the form of testimony of a *presently available witness*"). Moreover, petitioners' reliance on *United States v. Fox*, 211 F. Supp. 25, 30 (E.D. La. 1962), *aff'd*, 334 F.2d 449 (5th Cir. 1964), is particularly specious. In *Fox*, the court considered depositions that were taken in that case, not in a different case.

§ 62:564 (1984); *see also Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975); *Prusinki v. Holland*, 228 F. Supp. 959, 961 (E.D. Wis. 1964).

In any event, even if the district court could somehow have considered the workers' compensation deposition testimony, no issue of fact would have been created for trial. Moreover, Mr. Allgood merely testified in that deposition that Dr. Kenamore had advised him to stop smoking, and had warned him about emphysema. Mr. Allgood was not asked — and did not testify — as to whether Dr. Kenamore actually told him that he had emphysema. In contrast, the medical records and Dr. Kenamore's affidavit both independently establish that Mr. Allgood was told that he had emphysema more than two years before he died.

C. The Court Of Appeals Correctly Held That The Texas Doctrine Of Continuing Tort Did Not Apply In This Case

The court of appeals correctly held that the doctrine of continuing tort did not apply to this case because Mr. Allgood discovered that he had been injured by the product. Under Texas law, the determinative factor regarding limitations is when one discovers or should have discovered that he has been injured by the product, not when one stops using the product. *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. Ct. App. 1994). The court of appeals correctly held that the casual relationship between smoking and Mr. Allgood's injuries was known to Mr. Allgood as early as February of 1986 and, therefore, the continuing tort doctrine was inapplicable. (Pet. App. 3a).

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE SUMMARY JUDGEMENT ON PETITIONERS' WARRANTY CLAIMS

A. The Court Of Appeals Correctly Held That TI And CTR Were Not Sellers

Under Texas law, a seller is a person who sells or contracts to sell goods. Tex. Bus. & Comm. Code Ann. § 2.103(a)(4) (Vernon 1994). Respondents The Tobacco Institute, Inc. ("TI") and The Council for Tobacco Research - U.S.A., Inc. ("CTR") submitted affidavits stating that they had never manufactured or sold cigarettes. (Pet. App. 5a). Petitioners provided no evidence that TI or CTR ever sold or manufactured cigarettes.

B. The Court Of Appeals Correctly Held That None Of The Statements Or Advertisements Relied On By Petitioners Explicitly Extend To Future Performance

The Texas Supreme Court has held that § 2.725 of the Texas Business and Commerce Code "clearly states" that a breach of warranty claim "accrues at the time of delivery, not at the time of discovery." *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 546 (Tex. 1986). The only exception to this rule occurs in breach of express warranty cases when a buyer and seller "freely negotiate to extend liability into the future." *Id.* at 546. For this exception to apply, however, the warranty must make specific reference to a specific date in the future. *Id.* at 548; *see also Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 756 n.2 (Tex. Ct. App. 1995).[2] Here, there was no negotiation between Mr. Allgood and any of the respondents, nor did any of the respondents' alleged warranties refer to a "specific date in the future."

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[2] The statute of limitations in implied warranty claims always runs from the date of sale. The future performance exception does not apply to implied warranty claims. *See, e.g., Safeway Stores*, 710 S.W.2d at 547-48.

Petitioners do not dispute these points. Instead, petitioners argue that a broader future performance exception should apply to their warranty claims. According to petitioners, warranty claims should not be governed by § 2.725's accrual language whenever manufacturers make any representation about the future performance of their goods, even when such warranties do not refer to a "specific date in the future." Courts applying Texas law, have repeatedly rejected attempts to impose such a broader "future performance" standard and have consistently held that the exception only applies when the warranty at issue refers to a "specific date in the future." *See, e.g., Dallas Power & Light Co. v. Westinghouse Elec. Corp.*, 855 F.2d 203, 207 (5th Cir. 1988); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 176 (Tex. Ct. App. 1989).

IV. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS' FRAUD CLAIM FAILED FOR LACK OF RELIANCE

Reliance is an essential element to all claims for fraud under Texas law, including claims based upon alleged fraudulent omissions. *Trenholm*, 646 S.W.2d at 930, 932; *Crawford Painting & Drywall Co. v. J. W. Bateson Co.*, 857 F.2d 981, 985 (5th Cir. 1988), *cert. denied*, 488 U.S. 1035 (1989).

Petitioners presented no summary judgment evidence indicating that Mr. Allgood smoked cigarettes in reliance on any alleged misrepresentation in the 1954 newspaper advertisement entitled "A Frank Statement To Cigarette Smokers." Petitioners presented no summary judgment evidence indicating that Mr. Allgood smoked cigarettes in reliance upon alleged misrepresentations in any of respondents' other advertisements. Both lower courts found that the summary judgment record negated petitioners' assertion that Mr. Allgood relied on advertising in choosing to smoke. (Pet. App. 6a-7a). Moreover, both courts noted that Petitioners' own expert witness, Dr. Grabowski, conceded that even if Respondents had placed explicit warnings on packages of cigarettes as early as 1942, Mr. Allgood would still have smoked. (*Id.*).

Given their complete failure to put forth even a shred of evidence on the element of reliance — not to mention a record which actually negates their claim — petitioners seek to change Texas law to permit them to raise their fraud claim on the ground that Mr. Allgood "had access to [respondents'] publications" and "probably read them." (Pet. 26). No case applying Texas law has ever adopted such a loose standard for the element of reliance. *See, e.g., Steiner v. Southmark Corp.*, 734 F. Supp. 269, 279 (N.D. Tex. 1990) (observing that no Texas precedent permits presumption of reliance for common law fraud claim). Moreover, no federal court has ever permitted a fraud claim to go to a jury based on such a mere conjecture, especially where the summary judgment evidence established that the plaintiff knew of the allegedly undisclosed facts. *See, e.g., Quest Exploration and Dev. Co. v. Transco Energy Co.*, 24 F.3d 738, 742 (5th Cir. 1994); *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1025-30 (5th Cir. 1991).

V. THE COURT OF APPEALS PROPERLY RULED THAT PETITIONERS' CLAIMS FAILED PURSUANT TO TEXAS' COMMON KNOWLEDGE DOCTRINE

As an alternative ground for granting respondents' motions for summary judgment, the court of appeals and the district court ruled that petitioners could not maintain their claims because Texas law does not permit product liability suits based on inherent risks that are "common knowledge." Pet. App. 7a-8a; (R. 5504-5501, 5753-5752). In *McGuire*, the Texas Supreme Court rejected claims for strict liability, fraud, negligence, breach of warranty and conspiracy — the identical causes of action raised in this lawsuit — against manufacturers of alcoholic beverages and related trade organizations. *McGuire*, 814 S.W.2d 385. The court of appeals correctly held that, like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community. *See, e.g., Roysdon v. R. J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Paugh v. R. J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230-31 (N.D. Ohio 1993).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

Of Counsel:

CHADBOURNE & PARKE L.L.P.
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

SAM W. CRUSE, Jr.
(Counsel of Record)
CRUSE, SCOTT, HENDERSON & ALLEN, L.L.P.
Two Houston Center
909 Fannin #1850
Houston, Texas 77010
(713) 650-6600

Counsel for Respondent The American Tobacco Company

Of Counsel:

JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939

RICHARD H. CALDWELL
MAYOR, DAY, CALDWELL & KEETON
1900 NCNB Center
700 Louisiana
Houston, Texas 77002
(713) 225-7000

Counsel for Respondent R.J. Reynolds Tobacco Company

Of Counsel:

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

LEA F. COURINGTON
GWINN & ROBY
4100 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 698-4100

Counsel for Respondent The Tobacco Institute, Inc.

Of Counsel:

DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-6000

WILLIAM KEY WILDE
BRACEWELL & PATTERSON
711 Louisiana, Suite 2900
South Tower Pennzoil Place
Houston, TX 77002
(713) 223-2900

Counsel for Respondent The Council For Tobacco Research - U.S.A., Inc.

September 13, 1996